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No. 92-745

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

IN RE MOSES N. ASLAN,
Debtor.

MOSES N. ASLAN,
Petitioner,

v.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's statement of the questions presented is erroneous. First, Petitioner asserts that the Ninth Circuit Court of Appeals erred in affirming the Bankruptcy Court's failure to look behind a stipulated state court judgment to determine the *validity* of a creditor's claim against the bankruptcy estate. In fact, the *validity* of the claim is not in issue; the Bankruptcy Court merely, and properly, refused to look behind the stipulated judgment to determine the *amount* of the claim. Second, Petitioner asserts that the Bankruptcy Court erred "in failing to disallow the $2 million penalty portion" of Respondents' bankruptcy claim under the Judgment. In fact, the Bankruptcy Court made no finding that the claim included any penalty and, to the contrary, found that there was no penalty.

Accordingly, the questions presented are these:

1. Did the Ninth Circuit Court of Appeals err in affirming, on *res judicata* principles, the Bankruptcy Court's and District Court's refusal to look behind a stipulated state court judgment to determine the amount of a creditor's claim against the bankruptcy estate, where the judgment was not procured by fraud and the state court had jurisdiction to render it?

2. If, notwithstanding principles of *res judicata*, the Bankruptcy Court was required to look behind and revisit the stipulated state court judgment, did the discount for early payment, for which the judgment provided, constitute an unenforceable penalty?

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OPINIONS BELOW

Petitioner's Reports of Opinion Below [Petition, p. 2] erroneously states that Respondents suggested a rehearing *en banc* after the Court of Appeals issued its May 29, 1992 Memorandum Opinion (the "Opinion"). However, only Petitioner sought any rehearing after the issuance of the Opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions which Petitioner contends are involved, Respondents refer to:

28 U.S.C. § 1738.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Factual Background.

The Statement of the Case in Moses N. Aslan's ("Aslan") Petition for Writ of Certiorari (the "Petition" or "Pet.") contains material misstatements, and omits relevant facts. Accordingly, Respondents The Hongkong and Shanghai Banking Corporation

("Hongkong Bank") and Central Bank (sometimes collectively "the Banks")[1] set forth the factual background in some detail.

1. The Banks' Judgment Against Aslan.

In early April, 1982, the Banks learned that Aslan had stolen millions of dollars from them by perpetrating a "check kite" between accounts he maintained in the two Banks. [Appellant's (Aslan's) District Court Excerpts of Record ("A.D.C.E.") at 220.] When confronted, Aslan admitted that he had taken about $3.2 million from the Banks by writing checks on his Hongkong Bank account with the knowledge that there was insufficient money in the account to cover such checks. Aslan deposited the checks into his Central Bank account, and wrote bad checks on that account to cover the Hongkong Bank checks. Aslan and his accountant both admitted that Aslan had invested the proceeds of the kite in Aslan's real property holdings, and that obligations secured by those properties could not have been met without the stolen funds. [A.D.C.E. at 220; Appellants' (Banks') District Court Excerpts of Record ("B.D.C.E.") at 732-733.][2]

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[1]Pursuant to Supreme Court Rule 29.1: Hongkong Bank is a wholly owned subsidiary of HSBC Holdings plc. Hongkong Bank's subsidiaries (other than wholly owned subsidiaries) are Aspiration Land Investment Ltd.; Banking Computer Services Pte. Ltd.; Collyer Quay Properties Ltd.; Electronic Payment Services Co. (HK) Ltd.; Eltis Precision Printing Ltd.; Hang Seng Bank Ltd.; The Hong Kong Futures Guarantee Corporation, Ltd.; Hongkong and Shanghai Thomas Cook Ltd.; The International Investment Company of Chile S.A.; Isoba Ltd.; Ocean Properties Pte. Ltd.; Ocean Towers Pte. Ltd.; Ortigas and Company Limited Partnership; Plimmer City Centre Ltd.; Tindalk Ltd.; Vinebel Realties Ltd.; and Xinjiang World Plaza Hotel Ltd. Central Bank, now known as Bank of the West, is a wholly owned subsidiary of Banque Nationale de Paris. Bank of the West has no non-wholly-owned subsidiaries.

[2]Contrary to Aslan's assertion [Pet. at 5 n.2], the record below is not "totally silent" on Aslan's liability for the check kite. In addition to the plain admissions cited above, the Banks' claim squarely recited that it was based on the check kite [A.D.C.E. at 2], a recital never challenged by Aslan; the Banks' counsel referred to the check kite in oral argument

The Banks commenced an action against Aslan in the Los Angeles County Superior Court in April, 1982 (not December, 1983 as intimated in the Petition) for recovery of the proceeds from the check kite and interest thereon, punitive damages for fraud, treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and other relief. Because Aslan had admitted investing the stolen funds in his properties, the Banks sought imposition of a constructive trust on Aslan's real properties, and recorded notices of lis pendens against the subject real properties. [A.D.C.E. at 144, 220-221.][3]

In addition to the check kite, Aslan had defaulted on a loan from Hongkong Bank secured by a deed of trust on the Rowan Building. Although Aslan delayed Hongkong Bank's collection efforts by purporting to transfer the building to Quinbros Investment Partnership ("Quinbros") and placing Quinbros in an involuntary bankruptcy case, Hongkong Bank obtained relief from the automatic stay in the Quinbros case on the ground of bad faith, and scheduled the foreclosure sale of the Rowan Building. Aslan and his then-counsel, Charles T. Rose ("Rose"), appeared at the scheduled sale on March 26, 1985, and negotiations took place concerning settlement of Aslan's obligations to the Banks. [A.D.C.E. at 221-222, 275-276.]

Hongkong Bank's counsel, Charles M. Levy ("Levy"), explained to Rose and Aslan that the Banks' losses far exceeded the principal amount of the check kite. In addition, interest had accrued; and the Banks were entitled to share in the tremendous appreciation in the value of Aslan's real properties, because Aslan admittedly had used funds from the check kite to meet his real property obligations. [B.D.C.E. at 317-322, 732-733.] The Banks claimed the right to additional damages under RICO, and punitive damages. Levy proposed settlement for at least $10,000,000

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without objection [*see, e.g.*, A.D.C.E. at 684-685]; and Aslan flatly admitted to his counsel that he had perpetrated the check kiting scheme against the Banks. [B.D.C.E. at 753.]

[3]Aslan has continually and falsely asserted that the Banks only sued him for $3,151,158.22, the principal amount of the check kite [Pet. at 4]. The record, and the Judgment, demonstrate otherwise.

(including the amount owed on the Rowan Building loan). [A.D.C.E. at 220-222, 276.] Aslan and Rose agreed that Aslan would stipulate to judgment in favor of the Banks in the sum of $10,000,000, reducible, at Hongkong Bank's option, by the amount owed on the Rowan Building;[4] and for possession of the real properties.

Levy told Rose that the Banks were hesitant to rely upon Aslan to perform his stipulated obligations because of his prior conduct: Aslan had reneged on at least two agreements to sell real property; he had refused to sign a stipulation for relief from stay in favor of United Overseas Bank ("UOB") in the Quinbros bankruptcy case after having agreed in open court to do so; he had unsuccessfully sought to avoid obligations under a contract with UOB; and, on Hongkong Bank's motion for relief from stay, the Quinbros case had been held a bad-faith bankruptcy. In light of this history, Levy told Rose that Aslan needed an incentive, in the form of a discount for prompt payment, in order to create any hope that Aslan would voluntarily meet his obligations to the Banks. [A.D.C.E. at 222-223.] Thus, it was agreed that if Aslan made four timely installment payments, the Banks would discount the full amount of the Judgment by $2,000,000, and would give up its rights in the real estate. [A.D.C.E. at 26, 222, 276.] At the Courthouse in Norwalk on March 26, 1985, where the Rowan Building foreclosure sale had been set, the parties all signed a handwritten stipulation, to be later transcribed and re-signed, for entry of judgment on those terms. [A.D.C.E. at 222, 276.][5]

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[4]The Judgment was so reduced, to the principal sum of $8,373,298.56. [A.D.C.E. at 5, 223-225.]

[5]The Petition falsely asserts that Hongkong Bank's counsel made statements to the effect that the $2,000,000 discount "was intended to be a penalty to be assessed against the Debtor if he failed to meet his obligations under the Stipulated Judgment." [Pet. at 6.] Aslan's assertion, which bears no citation to the record, is false on two grounds. First, the record shows that Hongkong Bank's counsel did not make the statements attributed to him. Second, Aslan continues to refer to his *option* to keep his properties and reduce the Judgment amount, by making specified time payments, as *obligations*. [Pet. at 6.] The Judgment never obligated Aslan to make any installment payments; it

Aslan initially attempted to renege on the stipulation; but after a meeting with his counsel, Aslan decided to honor his commitments. [A.D.C.E. at 276-277.] Thereafter, the foreclosure sale of the Rowan Building was periodically continued while a more detailed written Stipulation for Entry of Judgment was negotiated and prepared. [A.D.C.E. at 223, 276-277.] The Banks agreed to several of Aslan's requests for changes in the March 26 stipulation, including giving Aslan six more months to make his payments. [A.D.C.E. at 223, 276-277.]

No agreement was reached concerning the foreclosure sale of the Rowan Building, and the sale was held on June 11, 1985. Hongkong Bank was the successful bidder, buying the property for the loan indebtedness of $1,694,010.66. Thereafter, on June 28, 1985, Hongkong Bank resold the Rowan Building for $5,000,000. Meanwhile, the final formal Stipulation For Entry Of Judgment was completed, executed, and presented to a judge of the Los Angeles County Superior Court for approval at a hearing on July 18, 1985. Aslan testified at the hearing, in the presence of Rose, his counsel, that he desired to end the litigation and was stipulating to entry of judgment against him freely, voluntarily, and without duress. [Banks' Supplemental Excerpts of Record ("B.S.E.R.") in Court of Appeals, at 9-10.][6] After the judge questioned Aslan about it, the Judgment was approved and

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merely gave him the option to keep his properties, make the installment payments, and thereby obtain a $2,000,000 discount if he chose to do so. [A.D.C.E. at 26; Bankruptcy Court Finding of Fact No. 6, A.D.C.E. at 494.]

[6]Although Aslan alleges that he "was under extreme financial pressure to resolve his dispute with the Banks" [Pet. at 4], the record is entirely to the contrary. The Bankruptcy Court specifically found that the Judgment was the result of negotiation and compromise, and that Aslan received reasonably equivalent value for the consideration given by him pursuant thereto [Petition, Appendix ("App.") E-4]; Aslan was represented throughout by counsel; and no contention was ever made that the Bank improperly coerced Aslan to enter into the stipulated Judgment. Moreover, the Judgment was entered after a full Superior Court hearing, at which Aslan testified that no duress had been imposed upon him to enter into the stipulation. [B.S.E.R. at 1-13.]

entered. [A.D.C.E. at 5-36, 224, 278; B.S.E.R. at 13.] No appeal was taken, and no other relief from the Judgment was sought.

The Judgment was (a) for damages of $8,373,298.56 plus 10% interest, (b) that Aslan held legal title to enumerated parcels of real property for the use and benefit of the Banks, and (c) that the Banks had the right to demand transfer of record title to the properties. In addition, the Judgment recited that so long as Aslan had not defaulted on any obligations secured by the properties, he could satisfy the Judgment (and thus keep the properties) by timely making four specified payments totaling $6,373,298.56 plus interest. The first two payments, of $1,584,574.64 each, were due July 1 and September 30, 1985 respectively; the third payment of $1,619,574.64 was due December 31, 1985; and the remaining balance was due June 30, 1986. The Judgment also provided that if the Banks took title to the properties, they would remit to Aslan all sale proceeds therefrom in excess of the full Judgment amount ($8,373,298.56) plus all interest thereon. [A.D.C.E. at 5-36, 224-225, 278.]

2. The Parties' Post-Judgment Letter Agreement.

After entry of Judgment the parties negotiated an August 1, 1985 Letter Agreement (the "Letter Agreement"), whereby Hongkong Bank agreed to credit against the Judgment the net profits of $3,137,209.58 which Hongkong Bank had realized from the resale of the Rowan Building. [A.D.C.E. at 225-226, 278-279.] This extremely generous credit would have enabled Aslan to make the first two time payments under the Judgment. However, it was *expressly conditioned* upon, among other things, Aslan's affirming, ratifying and performing all of his obligations under the Judgment including, most importantly, timely paying all the sums required; and his approving the Rowan Building resale. [A.D.C.E. at 38, 41, 225-226.] Rose explained in detail to Aslan, his client, that if Aslan failed to perform all the terms and conditions of the Judgment, including payment of all sums due thereunder, or attacked the Judgment, Aslan would forfeit any right to the credit from the resale of the Rowan Building. [B.D.C.E. at 749-750.]

3. Aslan's Failure To Make Payments.

Aslan contended in the Bankruptcy Court that the Rowan Building resale profits would cover the first two installments under the Judgment. Issues then arose concerning his admitted failure to make, timely or at all, the third and fourth payments.

The third payment was due December 31, 1985. At that time, Amana Corporation ("Amana") had been negotiating with the Banks for purchase of the Judgment, and Amana had executed a letter of intent (the "Letter of Intent") on December 30, 1985. [A.D.C.E. at 155-158.] Amana deposited $2,000,000 which would have constituted a down payment on the purchase of the Judgment, and the Banks prepared a draft purchase agreement based on the Letter of Intent. [A.D.C.E. at 159-167.] However, new and changed terms demanded by Amana prevented consummation of any agreement.[7] Amana's deposit was returned, and the Letter of Intent was rescinded on February 20, 1986. [A.D.C.E. at 227.]

The Letter of Intent provided that if negotiations were unsuccessful, Hongkong Bank would return Amana's deposit and Aslan would then have five days to make the third installment payment. When the Amana negotiations terminated, the Banks, although the Letter of Intent had been rescinded, still left the door open for Aslan to perform the Letter Agreement and tender the third payment to the Banks within five days (*i.e.*, by February 25, 1986). However, no such tender was made. [A.D.C.E. at 227-228, 274.]

Aslan filed his Chapter 11 Petition on March 3, 1986, well after the expiration of the deadline for the third payment. Aslan never tendered either the third payment or the fourth and final payment,

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[7]The Petition erroneously asserts, without any citation to the record, that Amana rejected the Banks' counterproposal to the Letter of Intent "because the Banks added certain indemnification provisions which were unacceptable to the Amana Corporation." [Pet. at 7.] In fact, the Letter of Intent did not result in an agreement, not because of terms requested by the Banks, but because of certain indemnifications *demanded by Amana*. [A.D.C.E. at 227.]

the deadline for which was June 30, 1986. [Findings of Fact Nos. 14-15; A.D.C.E. at 496.][8]

B. Procedural Background.

Aslan's summary of the procedural background of this case [Pet. at 7-9] is erroneous in two respects.

First: In two different places, the Petition asserts that after the Ninth Circuit issued its Opinion filed May 29, 1992, both Aslan and the Banks requested a rehearing. [Pet. at 2, 9.] The Banks did not request any rehearing after the May 29 Opinion was issued; only Aslan requested a rehearing, and his petition was denied. The Petition's suggestion to the contrary gives the false impression that both sides are dissatisfied with the Opinion.

Second: Aslan alludes ambiguously to an "offset issue" which was the subject of the Banks' cross-appeal in the Ninth Circuit. Aslan asserts that the "offset issue is not a part of this appeal." [Pet. at 9.] The "offset issue" relates to the Banks' contention, in the Ninth Circuit, that because Aslan was attacking the Judgment, he should not be entitled to retain the profits from the resale of the Rowan Building, the consideration for which was Aslan's ratification and payment of the entire Judgment.[9] The

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[8]The filing of the bankruptcy did not stay the deadline for the third payment. Bankr. Code § 108(b). However, the Bankruptcy Court did not need to make a finding on that point, because Aslan also failed to make the fourth payment within the "grace period" of Section 108(b), which failure, the Bankruptcy Court ruled, precluded Aslan from obtaining the $2,000,000 discount. Pet. App. E-6. Aslan does not challenge that determination.

[9]Aslan mischaracterizes the Letter Agreement in two respects. First, he states that by the Letter Agreement, the Banks agreed to give Aslan a credit from the sale of the Rowan Building. In fact, Hongkong Bank purchased the Rowan Building at its own foreclosure. It subsequently *resold* the building, and agreed to give Aslan a credit in the amount of the net profits (not "proceeds" as stated by Aslan) from the *resale*. Second, although Aslan's own counsel candidly referred to the Letter Agreement as a "pure gift" to Aslan [B.D.C.E. at 754], in fact the Banks understandably did not simply give Aslan more than $3,000,000

Ninth Circuit Court of Appeals held that Aslan's attack on the Judgment did not impair his right to the Rowan Building credit, in part because the Banks were, by virtue of the Opinion, recovering the full amount of the Judgment. [Pet. App. C-11.]

The Banks' contentions with regard to the Rowan Building profit will be renewed only if Aslan's Petition is granted. The Banks argue hereinbelow that Aslan's Petition falls far short of the showing required, and should be denied; but as a matter of caution, the Banks are filing a Cross-Petition for Writ of Certiorari concurrently herewith, to be considered only if the Court grants Aslan's Petition. In other words, the Banks will accept the result below, but reserve the contention that if Aslan is somehow held entitled to a $2,000,000 refund under the Judgment by virtue of his "penalty" argument, then either this Court or, on remand, the Bankruptcy Court after an evidentiary hearing, should determine whether any successful attack on the Judgment by Aslan vitiates his right to the Rowan Building profit.

ARGUMENT: ASLAN'S PETITION SHOULD BE DENIED

A. Summary of Argument.

Aslan invested the multi-million-dollar proceeds of a check kite in real estate. When the victim Banks discovered the check kite and sued Aslan, Aslan chose to save his real estate holdings and compromise the amount of the Banks' damages by entering into a stipulated Judgment, entered by a California court of competent jurisdiction, after a full hearing at which Aslan was represented by counsel and testified that he stipulated to the Judgment freely and without duress. He never sought any relief from the Judgment in the California courts. The Judgment is, under California law, valid, final and enforceable in all respects.

The Judgment included an option by which Aslan could reduce the judgment amount by $2,000,000, and retain his real property holdings, by making four timely installment payments to the

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without consideration. That consideration consisted of Aslan's agreement to ratify, affirm, approve and pay the entire Judgment. [A.D.C.E. at 41-42.]

Banks. After his deadline for making the third payment had expired, Aslan filed a bankruptcy petition. In the Bankruptcy Court, he attacked the $2,000,000 discount provision as an unenforceable penalty. The Bankruptcy Court properly concluded that because Aslan has not challenged the Judgment in the California courts, and did not contend that the Judgment was procured by fraud or that the California courts had lacked jurisdiction, there was no basis for a collateral attack in the Bankruptcy Court, and that *res judicata* prohibited the Bankruptcy Court from reopening the state court Judgment. The Court also concluded that because the Banks, by virtue of its ruling, were receiving the entire Judgment amount, consideration had not failed for the Rowan Building credit. The District Court and Court of Appeals agreed, and affirmed.

Aslan now seeks review in this Court, on the stated ground that the Ninth Circuit's Opinion "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S.Ct. R. 10.1(a). The Petition fails to set forth any justification for further review by this Court, for the following reasons:

1. The Ninth Circuit Opinion is entirely consistent with the decisions of at least eight other Circuits and of this Court, and does not conflict with the decisions of any Circuit.

2. The Opinion not only fails to depart, radically or at all, "from the accepted and usual course of judicial proceedings", but also is manifestly correct. Collateral estoppel does apply in bankruptcy courts, such that a final state court judgment may not be collaterally attacked unless one of the specific exceptions to the *res judicata* doctrine — fraud or lack of jurisdiction — is urged and established.

B. This Case Is Inappropriate For Certiorari.

The principal argument of Aslan's Petition is that Bankruptcy Courts have inherent equitable power to reject or reduce the amount of a claim in bankruptcy, even if the claim and its amount are based on a final judgment of a state court of competent jurisdiction, and even if no fraud is alleged or proved.

As the Banks will explain, acceptance of Aslan's position would require rejection of the decisions of every Circuit which has considered the question — there are, including the Ninth Circuit panel which rendered the Opinion in this case, at least nine — and overruling of this Court's decision in *Grogan v. Garner*, ____ U.S. ____, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). It is settled that principles of *res judicata* do apply in bankruptcy court, unless one of the recognized exceptions is established — fraud or lack of jurisdiction, neither of which was even urged here.

There is no conflict among the circuits. [S.Ct. R. 10.1(a); *cf. Braxton v. United States*, ____ U.S. ____, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991) (a principal purpose for certiorari jurisdiction is to resolve conflicts among Circuits concerning the meaning of provisions of federal law).] There is no new or important issue here. [*Cf. Reading Co. v. Brown*, 391 U.S. 471, 474-475, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968).] Nor does the Opinion conflict with any decision of this Court. [S.Ct. R. 10.1 (c).] Accordingly, this is not an appropriate case for certiorari, which "will be granted only when there are special and important reasons therefor." [S.Ct. R. 10.1.]

Aslan, conceding that the usual bases for certiorari are lacking, relies *entirely* on the proposition that the Opinion "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." [Pet. at 10; S.Ct. R. 10.1(a).]

As the Banks will explain, had the Ninth Circuit adopted Aslan's position, it would have been the only circuit to do so. Instead, its Opinion complied in every way with "the accepted and usual course of judicial proceedings". It is Aslan's argument — that the Bankruptcy Courts should have virtually unfettered rights to ignore principles of *res judicata* whenever a judge believes it would be equitable to do so—that contravenes all the applicable authorities. Accordingly, this case bears no resemblance to those in which this Court's supervisory powers were appropriately invoked to review decisions which could have radically affected the administration of justice in the federal courts. *See, e.g., McNabb v. United States*, 318 U.S. 332, 340-341, 63 S.Ct. 608, 87 L.Ed. 819 (1943).

Under these circumstances, Aslan's Petition fails to meet any of the recognized standards and should be denied.

C. Bankruptcy Courts Do Not Have Equitable Power To Deny *Res Judicata* Effect to Final, Valid State Court Judgments.

Even if Aslan somehow could be held to have met the standards for granting of a writ of certiorari, nevertheless the Ninth Circuit's Opinion must be affirmed, because Aslan neither urged nor established any exception to application of *res judicata*.

1. Introduction: Bankruptcy Courts Are Bound By Principles Of *Res Judicata*.

It is well established that a bankruptcy court is required to give full faith and credit to a final state court judgment. *Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853, 90 L.Ed. 970, *reh. denied*, 328 U.S. 879, 66 S.Ct. 1335, 90 L.Ed. 1647 (1946); *In Re Morton*, 43 Bankr. 215, 218 (Bankr. E.D.N.Y. 1984). This requirement is codified in 28 U.S.C. Section 1738, which states in relevant part:

> "[The] Acts, records and judicial proceedings [of any state, territory or possession of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.[10]

Aslan argues that a bankruptcy court may use its equitable powers to reopen and "look behind" a final state court judgment, without giving it *res judicata* effect. [Pet. at 13.] Aslan's argument is meritless. The cases he cites support the Banks' position that the courts below properly applied *res judicata*, and were required to do so.

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[10]Although Section 1738, by its terms, calls for the extension of "full faith and credit" to state court judgments, the courts in applying this section have interpreted it as a requirement that federal courts give "*res judicata* effect" to state court judgments. *See, e.g., In Re Morton*, 43 Bankr. at 217. This Brief will adopt the courts' terminology and refer to the "*res judicata* effect" of prior state court judgments.

2. The Bankruptcy Court Met Its Responsibility To Effect A Fair Result.

Contrary to Aslan's assertions, the Bankruptcy Court did not ignore its responsibility to equitably administer a debtor's estate. [Pet. at 10.] Indeed, the Bankruptcy Court, mindful of its duties, made meticulous findings, including a specific finding that the Judgment does not contain or involve an unenforceable penalty or forfeiture. [Conclusion of Law No. 23, A.D.C.E. at 497.]

3. Neither Of The Two Recognized Exceptions To *Res Judicata* Is Present Here.

There are only two accepted grounds for a bankruptcy court to deny *res judicata* effect to a state court judgment: fraud and lack of jurisdiction. Neither of those grounds has even been asserted in this case. As this Court explained in *Heiser v. Woodruff:*

> "Undoubtedly, since the bankruptcy act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud of a party . . . *But it is quite another matter to say that the bankruptcy court may reexamine the issues determined by the judgment itself. It has from an early date been held to the contrary. . . .*
>
> *"Neither Pepper v. Litton . . . nor the other cases which [respondents] cite, sustain the contention that the bankruptcy court, in passing on the validity of creditors' claims, may disregard the principles of res judicata." Heiser v. Woodruff,* 327 U.S. at 737 (emphasis added).

Since *Heiser*, the courts have recognized that these two equitable grounds for challenging a prior judgment — lack of jurisdiction and fraud in the procurement — are narrow, and were not meant to undermine the basic principles of *res judicata. See, e.g., In Re Morton*, 43 Bankr. at 218; *In Re Oulman*, 75 Bankr. 232, 235 (N.D. Iowa 1987), *aff'd*, 851 F.2d 1032 (8th Cir. 1988). Aslan has never alleged that the California state court that

entered the Judgment lacked jurisdiction, or that the Judgment was obtained by fraud. Accordingly, no equitable grounds existed that would have permitted the lower courts to refuse to apply the doctrine of *res judicata* to uphold the Judgment.

Indeed, all of the cases cited in Aslan's Petition support the Banks' position that the lower courts correctly applied the doctrine of *res judicata*. In addition to *Heiser v. Woodruff*, Aslan relies on *Margolis v. Nazareth Fair Grounds and Farmers Market*, 249 F.2d 221 (2d Cir. 1957), *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939), and *Kelleran v. Andrijevic*, 825 F.2d 692 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988).

In *Margolis*, unlike this case, judgment creditors' claims in bankruptcy were susceptible to collateral attack based on evidence that the judgments had been fraudulently procured. 249 F.2d at 224. Similarly, this Court in *Pepper* upheld the decision of the district court disallowing the salary claim of the controlling stockholder of a debtor corporation, where the state court judgment on which the claim was based had been obtained as the result of a "planned and fraudulent scheme." 308 U.S. at 312. Thus, both *Margolis* and *Pepper* invoked the fraud exception to *res judicata*.

Likewise, in *Kelleran*, the Second Circuit Court of Appeals reversed the Bankruptcy Court's refusal to give a state court default judgment binding effect. The Court properly held:

> " 'Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged will do so. . . .' *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980) (citing 28 U.S.C. § 1738 (1982)). Bankruptcy courts fall within Congress' mandate." 828 F.2d at 694.

Significantly, Aslan is forced to rely on the *dissent* of District Judge Blumenfeld in *Kelleran*; the dissenting judge urged that because the judgment in that case had been obtained by default, and not after litigation on the merits, the judgment should be reopened. 825 F.2d at 698-699. Even if the dissent reflected the

state of the law — which it does not — nevertheless the Judgment in this case suffered from no such infirmities. It was entered after a full hearing, and with the consent of Aslan.[11] Indeed, any doubt about whether principles of collateral estoppel apply in bankruptcy cases was resolved by this Court last year in *Grogan v. Garner, supra*, in which the Court held:

> "Our prior cases have suggested, but have not formally held, that the principles of collateral estoppel apply in bankruptcy proceedings under the current Bankruptcy Code. See, *e.g.*, *Kelly v. Robinson*, 479 U.S. 36, 48, n.8, 107 S.Ct. 353, 360, n.8, 93 L.Ed.2d 216 (1986); *Brown v. Felsen*, 442 U.S., at 139, n.10, 99 S.Ct. at 2213, n.10. Cf. *Heiser v. Woodruff*, 327 U.S. 726, 736, 66 S.Ct. 853, 857, 90 L.Ed. 970 (1946) (applying collateral estoppel under an earlier version of the bankruptcy laws.) Virtually every court of appeals has concluded that collateral estoppel is applicable in discharge exception proceedings [citing Court of Appeals decisions of six circuits]. Cf. *In re Rahm*, 641 F.2d 755, 757 (CA 9) (prior judgment establishes only a prima facie case of nondischargeability), cert. denied *sub nom. Gregg v. Rahm*, 454 U.S. 860, 102 S.Ct. 313, 70 L.Ed.2d 147 (1981). *We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to section 523(a).*" ____U.S. at ____, 111 S.Ct. at 658 n.11 (emphasis added).

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[11]Aslan also cites Bankruptcy Court decisions which, even if they were deemed influential, are obviously distinguishable. In *In re Fazio*, 41 Bankr. 865 (Bankr. E.D. Pa. 1984), a claim based on a state court judgment was *upheld* because no exception to *res judicata* had been alleged. And in *In re Bus Stop, Inc.*, 3 Bankr. 26 (Bankr. S.D. Fla. 1980), the amount of a claim under a judgment which accelerated the rent, after a lease default, for the entire lease term was reduced in accordance with a provision of the Bankruptcy Code expressly limiting the *amount* of such a claim to fifteen percent of the rent due for the remaining term.

Every Circuit appears now to be in accord with this principle.[12] Specifically, state court judgments were held entitled to collateral estoppel effect in bankruptcy proceedings in at least the following cases: *In re Halpern*, 810 F.2d 1061 (11th Cir. 1987); *In re Braen*, 900 F.2d 621, 630 (3d Cir. 1990); *Combs v. Richardson*, 838 F.2d 112, 115 (4th Cir. 1988); *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987); *Matter of Shuler*, 722 F.2d 1253 (5th Cir.), *cert. denied*, 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984); *Goss v. Goss*, 722 F.2d 599 (10th Cir. 1983); *Lovell v. Mixon*, 719 F.2d 1373 (8th Cir. 1983); and *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981).

In re Halpern involved facts nearly identical to those presented here. A debtor had consented to the entry of a state court judgment against him in a suit brought by First Georgia Bank ("First Georgia") alleging that the debtor had engaged in a check-kiting scheme. The $337,000 consent judgment provided that if debtor complied with a specified payment schedule, the judgment would be satisfied by total payment of $250,000. 810 F.2d at 1062. The debtor, like Aslan in this case, failed to meet the payment schedule and filed for bankruptcy. The Court held that the state court judgment collaterally estopped the debtor from relitigating the facts supporting it, stating:

> "Moreover, the consent judgment on its face evinces that [debtor] received consideration in exchange for agreeing that the judgment would constitute a final adjudication of the findings.[5] There is no evidence of coercion or duress, and the consent judgment was signed by both [debtor] and by his attorney. Under such circumstances, the bankruptcy court correctly concluded that '*[a] chilling effect on consent judgments and settlements might result if the court were to ignore*

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[12] *Grogan v. Garner* impliedly overruled a Ninth Circuit decision, *In re Rahm*, 641 F.2d 755 (9th Cir.), *cert. denied sub nom. Gregg v. Rahm*, 454 U.S. 860, 102 S.Ct. 313, 70 L.Ed.2d 147 (1981), cited in *Grogan* as the only Circuit Court case which had failed to apply collateral estoppel in discharge exception proceedings. 111 S.Ct. at 658 n.11. The Opinion in the instant case did not invoke *In re Rahm*, and is consistent with *Grogan v. Garner*.

such a clear and unambiguous expression of the parties' intent.'

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[5]This consideration consisted of First Georgia's agreement to accept $250,000 in full satisfaction of [debtor's] $337,000 debt if [debtor] met the payment schedule."

810 F.2d at 1065 (emphasis added).

Thus, there is no conflict in the Circuits over the point argued by Aslan. All the courts agree that a bankruptcy claim based on a final, valid state court judgment is entitled to collateral estoppel effect in the bankruptcy courts, absent fraud or lack of jurisdiction.

4. The Equitable Powers Of The Bankruptcy Courts Do Not Include The Power To Abrogate *Res Judicata.*

Although Aslan refers to the bankruptcy courts' equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]" [Bankr. Code § 105(a)], such powers are limited. "Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes." [2 King, *Collier on Bankruptcy* ¶ 105.01[3], at 105-4 (15th ed. 1992) (fns. omitted).] *See, e.g., Official Committee of Equity Security Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987), *cert. denied*, 485 U.S. 962, 108 S.Ct. 1228, 99 L.Ed.2d 428 (1988). Specifically, Section 105 is not "a roving commission to do equity," and does not give the bankruptcy court authority to contravene *res judicata* by relitigating or reexamining a final judgment. *Browning v. Navarro*, 887 F.2d 553, 559 (5th Cir. 1989), *reh. denied*, 894 F.2d 99 (5th Cir. 1990); *accord, In re Alston*, 49 Bankr. 929, 933 (Bankr. E.D.N.Y. 1985).[13]

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[13]Even if Aslan's expansive view of Bankruptcy Code Section 105(a) were accepted, this is not a case which the equities favored relieving Aslan from his stipulation. Not only did Aslan agree to the Judgment at a full court hearing, but also he later ratified and reaffirmed the

D. The Court of Appeals Properly Applied the Doctrine of *Res Judicata* To Uphold the Banks' Claim Based on a Final, Valid State Court Judgment.

1. Aslan Cannot Relitigate a Final California Judgment in the Federal Courts.

As explained above, a final, valid judgment was entered in a California state court against Aslan. Aslan cannot challenge the finality of the Judgment. He did not appeal; indeed, as Aslan concedes [Pet. at 18], a stipulated judgment normally is not appealable. Nor did he seek any reconsideration, modification or other relief in the California courts.

Under *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *In re A-1 24 Hour Towing, Inc.*, 33 Bankr. 281, 284 (Bankr. D. Nev. 1983), *quoting Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Furthermore, *res judicata* prevents the litigation not only of any defenses that were asserted or determined in the prior proceeding, but also those that *could have been* asserted or determined. *In re A-1 24 Hour Towing, Inc.*, 33 Bankr. at 284; *Brown v. Felsen*, 442 U.S. 127, 132, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). "[F]inal judgments of the courts serve a useful social function and are not lightly disturbed." *In re Ridill*, 1 Bankr. 216, 218-219 (C.D. Cal. 1979).[14]

Thus, Aslan cannot relitigate whether he is liable to the Banks, and for what amount. These issues were resolved by the Judgment entered more than seven years ago in the state court.

Judgment, in the Letter Agreement, making the application of *res judicata* even more compelling.

[14]As Justice Story wrote, "it is for the public interest and policy to make an end to litigation . . . that suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F.Cas. 532, 539, 2 Story 59 (C.D.D. Mass. 1841).

2. Stipulated Judgments Are Entitled to Preclusive Effect Under 28 U.S.C. Section 1738.

The fact that the Judgment was entered by stipulation does nothing to detract from its being considered a conclusive determination. *Greene v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978). Absent an "allegation that the parties did not intend the stipulation to finally determine the issues", a stipulated judgment is final and binding on the parties. *In re Levinson*, 58 Bankr. 831, 836 (Bankr. N.D. Ill. 1986), *aff'd*, 831 F.2d 1292 (7th Cir. 1987).[15]

More than four years after the entry of the Judgment, Aslan contended for the first time in the Ninth Circuit that he was "under extreme financial pressure to resolve his dispute with the Banks" [Pet. at 4] and therefore agreed to the Judgment. These new references to "financial pressure" are not only unsupported by the record but also irrelevant. Even if there were evidence supporting such references, "financial pressure" is not a ground for invalidating a judgment on a collateral attack. Moreover, Aslan testified that he entered into the stipulation without duress, and in the Letter Agreement he later ratified and affirmed the stipulation. Finally, claims not raised in the trial court are waived and may not be considered on appeal. *Stephen v. Arrow Lumber Co.*, 354 F.2d 732, 734 (9th Cir. 1966). Accordingly, the stipulated Judgment is entitled to preclusive effect.

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[15]It is noteworthy that even default judgments, and judgments by confession, have been afforded conclusive effect in subsequent bankruptcy proceedings. For example, in *In Re Fazio, supra*, 41 Bankr. 865, 867 (Bankr. E.D. Pa. 1984), a creditor's claim based on a state court confessed judgment was held not subject to attack by the debtor in a bankruptcy proceeding. Likewise, in *In Re New-Com Corp.*, 72 Bankr. 90, 95 (Bankr. W.D. Pa. 1987), the Court held that a default judgment barred the relitigating of an action, where the debtor had made no attempt to open or strike the judgment in the court which rendered it. *See also In Re A-1 24 Hour Towing, Inc.*, 33 Bankr. at 286.

E. Federal Courts Will Not Inquire Into the Amount of a Final State Court Judgment.

Aslan asks this Court, as he asked the Bankruptcy Court, District Court and Court of Appeals, to redetermine the amount of the Judgment. But such inquiry would violate 28 U.S.C. § 1738. Other courts faced with the same request have rejected it, and have enforced the prior judgment.

For example, in *In re Comer*, 723 F.2d 737, 740 (9th Cir. 1984), the Court of Appeals affirmed the decision of the bankruptcy court that it was precluded by *res judicata* from looking behind a state court judgment adverse to the debtor to determine the actual amount of the debtor's obligation. In dischargeability proceedings, the bankruptcy court had refused to admit evidence attacking the extent of the debtor's obligation, finding such evidence to be irrelevant and barred by *res judicata*. In affirming, the Court of Appeals stated:

> "Failing to apply *res judicata* under these circumstances would allow a bankrupt who has had full incentive to litigate, and who has fully litigated, an issue in state court . . . to have that same issue relitigated in the bankruptcy courts." *In re Comer*, 723 F.2d at 740.

Accord, Kelleran v. Andrijevic, supra, 825 F.2d at 695 (Court of Appeals, citing the preclusive effect of a final state court judgment, invoked *res judicata* even where lower courts had determined that judgment creditor's "claims were so outrageous as to warrant independent review of the liability issues decided in the state court").

The extent of Aslan's obligation to the Banks has already been determined in state court. As the authorities cited above make clear, and as three courts correctly have recognized, the Bankruptcy Court was bound by that determination.

1. The Judgment Would Be Given Full Effect in California and Must Be Afforded Like Effect by a Federal Court.

Aslan argues that (a) the bankruptcy court has the power to look into the factual merits of a state court judgment; and (b) the

Judgment in this case includes a "penalty" unenforceable under California and bankruptcy law and, therefore, should not have been recognized by the Bankruptcy Court. [Pet. at 14-21.] The Banks will meet below Aslan's characterization of part of the Judgment as a "penalty". Yet, even if the Judgment did contain a "penalty", it would be entitled to *res judicata* effect under California and bankruptcy law.

2. Aslan Was Not Deprived Of An Opportunity To Contest The Banks' Claim.

Aslan first relies heavily on *Margolis v. Nazareth Fair Grounds & Farmers Market, Inc., supra*, 249 F.2d 221 (2d Cir. 1957). However, *Margolis* supports the Banks.

In *Margolis*, a bankruptcy referee has disallowed claims based on a judgment by confession, after determining that there was no legal basis for the claims, that there were defenses, and that the creditors, who were former directors of the bankrupt debtor, had engaged in fraud in obtaining the judgments. Thus, invoking *Heiser v. Woodruff*, the Court recognized the well-settled fraud exception to *res judicata*. 249 F.2d at 224-225. From *Margolis*, Aslan attempts to argue that the stipulated Judgment in this case was entered after Aslan "defaulted on the payment of a debt" without an opportunity to raise defenses. [Pet. at 16.]

Even if, contrary to the authorities, a default judgment were not entitled to full faith and credit, Aslan's argument ignores the facts. First, he did not merely default on the payment of a debt; he stole money from the Banks through a check-kiting scheme. He invested the stolen proceeds in his buildings. Second, he was not deprived of any opportunity to present a defense; he stipulated freely and without duress to a judgment that would exonerate him from further liability and would offer the option of making specified payments in order to save his buildings. Third, Aslan does not even allege that there was fraud in obtaining the Judgment.

3. Under California Law, the Banks' Judgment Is Not Subject to Collateral Attack.

Aslan also repeats his failed argument that the $2,000,000 discount portion of the Judgment is unenforceable under California law as an impermissible penalty. He continues to ignore the critical distinction between the *direct review* of a judgment in a proceeding instituted in a proper state court for that specific purpose, and a *collateral attack* on a judgment, such as the one attempted here.

The Bankruptcy Court, District Court and Court of Appeals all recognized that Aslan's Objection to the Banks' Claim was an impermissible collateral attack on the underlying Judgment.

> "A collateral attack is made, not in a proceeding brought for the specific purpose of attacking the judgment, but in some other proceeding having a different purpose — *it is an attempt to avoid the effect of a judgment or order made in some other proceeding.*" *Gonzales v. State of California*, 68 Cal.App.3d 621, 632, 137 Cal.Rptr. 681 (1977) (emphasis added).

Aslan sought to avoid the effect of the Judgment, not in an action brought for that purpose, but in the bankruptcy case. Aslan's challenge was, therefore, collateral, and was governed by the rules applicable to collateral attacks.

In California, a judgment is *res judicata* and conclusive between the parties as to its subject matter. Cal. Code Civ. Proc. § 1908(a)(2).

> "It is the general rule that a final judgment or order is *res judicata* even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties. Lack of jurisdiction in the fundamental sense is essential, ordinarily, for collateral attack." *City and County of San Francisco v. Pacello*, 85 Cal.App.3d 637, 642, 149 Cal.Rptr. 705 (1978), *citing Pacific Mutual Life Ins. Co. v. McConnell*, 44 Cal.2d 715, 285 P.2d 636 (1955), *cert. denied and appeal dismissed*, 350 U.S. 984, 76 S.Ct. 472, 100 L.Ed. 851 (1956).

"[I]f such invalidity or want of jurisdiction does not appear on the face of the record, it will be presumed in favor of the former judgment or order." *Gonzales v. State of California*, 68 Cal.App.3d at 632. Thus, even an erroneous judgment, once final, is as conclusive as a correct one. *People v. Cotton Belt Ins. Co.*, 143 Cal.App.3d 805, 808, 194 Cal.Rptr. 210 (1983); *People v. Silva*, 114 Cal.App.3d 538, 550, 170 Cal.Rptr. 713 (1981). This result is mandated by the important policies of finalizing judgments and ending protracted litigation, which policies are applicable in both bankruptcy and non-bankruptcy proceedings. *In Re Garafano*, 99 Bankr. 624, 630 (Bankr. E.D. Pa. 1989).

Because Aslan never challenged the jurisdiction of the state court that entered the Judgment, the Judgment is "presumptively valid and immune from collateral attack." *In re Marriage of Stier*, 178 Cal.App.3d 42, 47, 223 Cal.Rptr. 599 (1986).

4. The Cases Cited by Aslan Are Inapposite.

Aslan's argument that the Judgment involves a "penalty" rests on three California cases. Aslan cites *Sybron Corp. v. Clark Hospital Supply Corp.*, 76 Cal.App.3d 896, 143 Cal.Rptr. 306 (1978); *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 9 Cal.3d 731, 108 Cal.Rptr. 845, 511 P.2d 1197 (1973); and *Los Angeles City School District v. Landier Investment Co.*, 177 Cal.App.2d 744, 2 Cal.Rptr. 662 (1960) for the proposition that the California courts will not allow the imposition of a penalty, and that, therefore, the Bankruptcy Court should have reduced the amount of the Banks' Claim under the Judgment. [Pet. at 17.] The three cases are wholly inapplicable to this proceeding, because they involved *direct review* of judgments; none arose upon a *collateral attack* on a judgment. As a result, the reviewing courts did not need to consider the *res judicata* effect of the judgments.

Thus, in *Sybron Corp. v. Clark Hospital Supply Corp.*, a buyer and seller of hospital beds entered into a settlement agreement which provided for the entry of judgment in the seller's favor should the buyer fail to make certain payments. When the buyer defaulted, the seller obtained a judgment. Two months later, the buyer moved to set aside the judgment. The buyer's motion was

denied by the trial court, but upheld on direct appeal, by the California Court of Appeal, on the ground that part of the judgment constituted a penalty.

Similarly, *Los Angeles City School District v. Landier Investment Co.* arose on direct appeal from a trial court's denial of the defendants' motion for relief from judgment brought approximately four years after judgment had been entered. Due to defendants' delay in seeking relief, the appellate court affirmed the trial court's order denying relief despite the claim that part of the judgment was a penalty. Thus even if the case were otherwise applicable — which it is not — it demonstrates that any rights Aslan would have had to seek relief in the California Courts have long since lapsed.

Finally, in the *Garrett* case, the California Supreme Court, on direct appeal, reversed a judgment dismissing the plaintiffs' action, holding that excessive late charges under a loan agreement were not valid liquidated damages but, rather, a penalty.

Clearly, the cases cited by Aslan were all decided on direct, not collateral, attacks.

> "A direct attack is a proceeding instituted for the specific purpose of vacating, reversing, or otherwise attacking the judgment as by motion for new trial, motion to vacate, appeal, an independent action in equity, and by certiorari or other writs." *Gonzales v. State of California*, 68 Cal.App.3d at 632.

The Courts below have correctly invoked the distinction between direct review and collateral attack. On direct review, a court may look behind the judgment for error. In a collateral attack, only a judgment rendered by a court lacking jurisdiction or procured by fraud may be denied *res judicata* effect.

The Judgment was *not* before the Bankruptcy Court on direct review. Nor could it be; the United States Supreme Court is the only federal court to which a final state court judgment may be appealed (28 U.S.C. § 1257). All other federal courts, including bankruptcy courts, lack jurisdiction to review a state court judgment on the merits. *In re James*, 940 F.2d 46, 53 (3d Cir. 1991);

see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The Banks' Judgment was before the Bankruptcy Court "only incidentally" as part of Aslan's Objection to the Banks' Claim. As a result, the Judgment may not be reviewed for error, and the cases cited by Aslan are irrelevant. Furthermore, as explained above, no grounds exist for a collateral attack upon the Judgment.

F. The Judgment Does Not Contain a Penalty Provision, Nor Is Aslan Entitled to Relief Under California Statutory Law.

1. The California Courts Will Not Construe a Contract as Effecting a Forfeiture Unless There Is No Other Reasonable Interpretation.

The Courts below were bound by *res judicata* to uphold the Banks' Claim based on the Judgment. However, even if the Courts had been permitted to reopen issues decided by the Judgment, they would have had to find that the Judgment did *not* contain any penalty provisions. Indeed, the Bankruptcy Court expressly found that the Judgment does not contain any penalty or forfeiture. [A.D.C.E. at 497.]

Aslan's Petition conveniently ignores many other terms and conditions contained in the Judgment in addition to the optional discount for early payment. [A.D.C.E. at 26.] Most important, the Judgment recites that the Banks beneficially own enumerated real properties. [A.D.C.E. at 5, 25.] Also under the Judgment, it was agreed that if the Banks exercised their right to demand record title to the properties, they would remit to Aslan all sale proceeds therefrom in excess of the full Judgment amount plus interest. [A.D.C.E. at 33-34.]

The amount of the Judgment, and the Banks' right to the properties, resulted from Aslan's admission that he not only stole millions of dollars from the Banks by his check kite, but also invested proceeds from his check kite in real properties. Accordingly, the Banks were entitled to share in any appreciation of the properties realized by Aslan through use of the Banks' money; that appreciation amounted to millions of dollars. The Banks also were entitled to punitive damages for fraud and treble damages

under RICO. The Banks agreed to discount the Judgment amount for prompt installment payments, in the hope that such a provision would induce Aslan to do what historically he never had done: perform his contractual obligations.

The Judgment clearly states that the Banks own the properties; and that Aslan has the choice of, in effect, buying back his properties for timely payment of $6,373,298.56 or future payment of $8,373,298.56. A seller of real estate, of course, can set whatever price he wants for the property. Thus the terms to which Aslan agreed were consistent with the analogous "time-price" doctrine, which provides:

> "[T]he owner of property, whether real or personal, has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit. . . ." *Verbeck v. Clymer*, 202 Cal. 557, 563, 261 P. 1017 (1927).

Likewise, it was Aslan's choice whether to pay $6,373,298.56 and retain his properties, or at a later date to either pay $2,000,000 more or suffer the sale of sufficient properties to satisfy his obligation to the Banks. Under such circumstances, where the obligor has a rational choice between alternatives, there is no "penalty" involved because the selection of one option over the other is not a breach at all. *Blank v. Borden*, 11 Cal.3d 963, 970-971, 115 Cal.Rptr. 31, 524 P.2d 127 (1974); *Western Camps, Inc. v. Riverway Ranch Enterprises*, 70 Cal.App.3d 714, 726-727, 138 Cal.Rptr. 918 (1977).

The California courts will not construe an agreement as effecting a forfeiture or penalty "unless no other interpretation is reasonably possible." *ABI, Inc. v. City of Los Angeles*, 153 Cal.App.3d 669, 682, 200 Cal.Rptr. 563 (1984). It was reasonable (and completely accurate) for the lower courts to interpret the Judgment as providing for a discounting of an acknowledged obligation for early payment, on the one hand, or a higher "price" over a longer time, and *not* a penalty upon default. Moreover, the Banks were entitled to damages far in excess of their out-of-pocket loss. The California courts would be compelled to find that

the Judgment was enforceable in the full amount of $8,373,298.56 plus interest.

2. The Bankruptcy Cases Cited by Aslan Regarding Penalties Are Inapplicable.

Aslan cites two bankruptcy court cases for the general proposition that a bankruptcy court will not enforce a penalty, or a liquidated damages clause that is in reality a penalty. [Pet. at 18.] This general principle simply has no application to the facts of this case. The Judgment does not contain or involve a penalty or liquidated damages clause. Moreover, the facts of the cases cited by Aslan to support these general propositions are distinguishable from the facts in this case.

For example, Aslan cites *In Re Oahu Cabinets, Ltd.*, 12 Bankr. 160 (Bankr. D. Hawaii 1981). Even if this bankruptcy court case had any value as precedent, it is still entirely inapplicable. *In Re Oahu* did not involve a judgment; therefore, the court was not required to consider *res judicata*. The issue was whether a landlord was entitled to collect interest and collection fees on past due lease rental payments from a Chapter 11 debtor/tenant. The bankruptcy court refused to enforce a lease provision imposing interest, costs, attorneys' fees and other charges, because it was an "effort to extract a penalty for late payment." *In Re Oahu Cabinets, Ltd.*, 12 Bankr. at 165.

The Chapter 11 debtor/tenant in *In Re Oahu* had breached the lease agreement by failing to make his rental payments. Aslan's failure to make the installment payments was *not* a breach or default under the Judgment. The unenforceable lease provision in *In Re Oahu* became effective only in the event of a default by the debtor/tenant. *In Re Oahu*, 12 Bankr. at 164. In this case, the amount of the Judgment was at all times more than $8 million; it did not become $8 million as a result of Aslan's decision not to make the installment payments.

Nor was there a judgment involved in *In Re Klefstad*, 95 Bankr. 622 (Bankr. E.D. Ark. 1988). [Pet. at 18.] In that case, a tax penalty, not reduced to judgment, was disallowed.

3. Even If the Judgment Contained a Penalty Provision, Aslan Would Not Be Entitled to Relief Under California Law.

Even if it were determined that Aslan could collaterally attack the Judgment *and* that the Judgment contained a penalty provision, nevertheless it still is invulnerable to attack because the methods to challenge it, under California law, either are inapplicable or can no longer be exercised because of the passage of time.

First, assuming Aslan could have appealed from the stipulated Judgment, his time to appeal expired years ago. Rule 2, Cal. Rules of Court.

Second, the time to assert mistake, inadvertence or error as a ground for relief from the effect of the Judgment under California Code of Civil Procedure Section 473 expired no later than six months after entry of the July 18, 1985 Judgment. Other than appeal, this was the only remedy, if any, which Aslan could have pursued in the Los Angeles County Superior Court — *if* he believed there were changed facts or excusable neglect entitling him to relief from his Stipulation for Entry of Judgment. *See Roth v. Morton's Chefs Services, Inc.*, 173 Cal.App.3d 380, 385-386, 218 Cal.Rptr. 684 (1985). Aslan not only failed to seek relief from the Judgment; by the Letter Agreement, he expressly ratified and approved the Judgment, which conduct furnished a separate and independent ground for the lower courts' refusal to look behind the Judgment. [Conclusion No. 24, A.D.C.E. at 497.]

G. If A Writ of Certiorari Were Issued and Aslan Prevailed on His Argument that *Res Judicata* Does Not Apply, Then the Entire Case Should Be Remanded to the Bankruptcy Court.

Even if, on some basis, Aslan persuaded this Court that a writ of certiorari should issue, and if Aslan's argument that the Bankruptcy Court was not bound by *res judicata* were found to have merit, nevertheless Aslan would not be entitled on the record herein to any reduction of the Judgment amount; the entire case would have to be remanded to the Bankruptcy Court.

Because the Bankruptcy Court did not find any basis for abrogating *res judicata*, no evidentiary hearing was necessary, so none was held, on whether the Judgment included a penalty. Indeed, the Banks have shown that the Judgment reflected a reasonable compromise and reduction of Aslan's liability. An evidentiary hearing would so establish.

Likewise, the Banks contend that if Aslan prevailed on his "penalty" argument, then consideration would have failed for the Banks' agreement, in the Letter Agreement, to give Aslan the Rowan Building resale profit in exchange for Aslan's ratifying, affirming, approving and fully performing the Judgment. For that reason, the Banks, as a matter of caution, have filed a Cross-Petition for Writ of Certiorari concurrently herewith, even though they will accept the Opinion as it now stands.

While the Banks submit that Aslan's Petition plainly must be denied, they respectfully request that if Aslan's Petition is granted and Aslan ultimately prevails on the merits, the entire case be remanded to the Bankruptcy Court for appropriate factual determinations.

H. Conclusion.

Aslan's Petition should be denied.

Respectfully submitted,

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